Supreme Court, U.S.
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No. 95-747

In The

Supreme Court of the United States

October Term, 1995

BILL MISURA,

Petitioner,

v.

COUNTY OF EL DORADO, on behalf of JOHNNY FLETCHER WOODS, a minor child,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Third Appellate District

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER CALIFORNIA FAMILY CODE § 7555 VIOLATES SUBSTANTIAL DUE PROCESS AND IS THEREFORE UNCONSTITUTIONAL.

II. WHETHER AS APPLIED IN THIS CASE CALIFORNIA FAMILY CODE § 7555 IS UNCONSTITUTIONAL.

III. WHETHER AS INTERPRETED BY THE CALIFORNIA COURT OF APPEAL SECTION 7555 IS REALLY A CONCLUSIVE PRESUMPTION, AND THUS, VIOLATES DUE PROCESS.

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I. THE UNITED STATES SUPREME COURT HAS JURISDICTION.

28 U.S.C. § 1257 states in pertinent part:

> (a) Final judgments or decree rendered by the highest Court in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the grounds of it being repugnant to the Constitution, treaties, or laws of the United States. . . .

This case involves the validity of a state statute on the grounds of its being repugnant to the Constitution. Petitioner asserts that California Family Code § 7555 is unconstitutional, in general, and as it was applied in this case.

The issue was first raised by petitioner in the trial court, in a motion in limine to exclude evidence not of the blood test, but of the computation, upon which the paternity index is computed. (C.T. 66-74.) Initially the court reserved its ruling on this motion. (C.T. 75.) It later overruled petitioner's objection to the admission of the computation, and invoked California Family Code § 7555. (App. 25.)

Petitioner prevailed in the trial court. Respondent appealed. Respondent's appeal did not raise the constitutional issue of California Family Code § 7555. The appellate court reversed on grounds not raised by respondent in its appeal. The appellate court, on its own, decided the

case based on its definition of the quantity, and quality of proof necessary to rebut the presumption. (App. 1-20.)

In a Petition for Rehearing to the appellate court, petitioner raised the issue of the unreliability of the assumptions used to compute the paternity index. The Petition for Rehearing was denied. (App. 22.)

Petitioner then brought a Petition for Review in the California Supreme Court. Petitioner raised the issues of the constitutionality of California Family Code § 7555 and its violation of due process. The California Supreme Court denied review, although two Justices voted to hear the case. (App. 26.)

The jurisdiction of the United States Supreme Court does not depend on whether the state court addressed the federal question. It is enough that the federal claim was made and not accepted. (*Lynk v. La Porte Superior Court No. 2*, 789 F.2d 554 (7th Cir. 1986).) Furthermore, when the California Supreme Court denies a Petition for Review, it is to be assumed that the court has been given fair opportunity to review the merits of the petitioner's claim, for purposes of exhaustion of state court remedies. (*Roman v. Estelle*, 917 F.2d 1505 (9th Cir. 1990).) The issue has been raised, preserved, and passed upon by the California Supreme Court.

Respondent's claim that this court does not have jurisdiction of this petition is erroneous. This court has jurisdiction under 28 U.S.C. § 1257 because petitioner exhausted his state court remedies on the issues raised by this petition.

II. THE STATE COURT'S DECISION IS VALID IF, AND ONLY IF, CALIFORNIA FAMILY CODE § 7555 IS VALID.

The court invoked California Family Code § 7555. This statute shifted the burden of proof onto petitioner to prove he was not the father of the child. The decision is only valid if California Family Code § 7555 is valid. If California Family Code § 7555 is found to be unconstitutional, the decision cannot stand. There is no adequate, independent state ground for the state court's decision to remain valid.

California Family Code § 7555 shifts the burden of proof to a putative father to disprove his paternity. (California Family Code § 7555.) California Family Code § 7555 affects the fundamental right of familial bonds, and therefore must be substantially related to a compelling state interest. The state interest which the Legislature cited in enacting California Family Code § 7555 was to "achieve a greater degree of equity and consistency" in paternity determinations. Far from achieving "equity and consistency," the statute invites error. By shifting the burden of proof on to putative fathers, the statute places almost the entire risk of error upon the accused man. Where familial bonds are concerned, obtaining equity and consistency in paternity determinations, is not such a compelling state interest so as to allow the state to shift the risk of error onto a putative father. The statute is not constitutionally valid.

The appellate court in this case violated petitioner's due process rights by applying the presumption codified in California Family Code § 7555 based upon a paternity

index, whose computation the state's own, and only, expert testified was improperly calculated. At the direction of the government, the state's expert computed the index by omitting a perfectly valid test that she had run, that categorically and absolutely excluded petitioner from possibly being the father of the minor child. The state's expert testified that, based on her test that she was uncertain whether or not petitioner had the necessary gene to be the father. She testified that her expert opinion was that there was less than two-thirds chance that he could have the necessary gene. She further testified that a computation based on lack of certainty of the necessary gene would not yield a paternity index sufficient to trigger the Family Code § 7555 presumption. The computation of the index in this case, had been done, against her best expert opinion, by ignoring the perfectly valid test she had run.

The court's invoking the presumption of California Family Code § 7555 in such a situation, and thereby shifting the burden of proof onto petitioner, was a violation of his due process rights. This violation of due process was made particularly egregious by the extraordinary proof required by the appellate court to rebut the presumption.

III. CALIFORNIA FAMILY CODE SECTION 7555'S PRESUMPTION OF PATERNITY VIOLATES SUBSTANTIVE DUE PROCESS.

Respondent's reliance on *Michael H., et al. v. Gerald D.*, 491 U.S. 110 (1989) is inappropriate. It is not relevant. In *Michael H., et al. v. Gerald D.*, 491 U.S. 110, *supra*, a

putative father brought suit to establish his paternity of a child born in wedlock. The husband was listed on the birth certificate as the father and had always claimed the child as his daughter. This court held that California Evidence Code § 621 did not violate the putative father's due process rights by foreclosing him from establishing paternity, because of the constitutionally protected fundamental interest in the marital family relationship. Appellant agrees that the marital family relationship is a protected interest which should not be violated by a putative father's request to break up the family unit.

This action was brought by respondent against petitioner to prove his paternity of a child born out of wedlock 12 years earlier. The child's mother admitted to having sexual relations with at least four different men during the time of conception. Only one of these men was tested and excluded. She also admitted to extensive drug use which made her memory of the time period of conception hazy, and her list of sexual partners incomplete.

The blood test was, at best, inconclusive according to respondent's own expert.

The California Court of Appeal held that evidence of the other sexual partners was insufficient to rebut the presumption of California Family Code § 7555 it had applied. As interpreted by the California Court of Appeal, in order to rebut the presumption of California Family Code § 7555, petitioner was required to provide evidence that it was impossible for him to have been the father, by showing that at the time of conception (12 years prior) he was physically unable to father a child, or by

proving that he was nowhere near the mother during the period of conception.

This level of proof when the events occurred 12 years before trial, and petitioner had no notice of the accusation for most of that time,[1] in essence, causes California Family Code § 7555 to be a conclusive presumption. Since California Family Code § 7555 involves the imposition of a familial relationship, the same constitutional protection which upheld California Evidence Code § 621 in *Michael H.*, should apply.

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[1] The mother first brought a paternity case against another man, asserting he was the only one with whom she had sexual contact. Only after that effort failed, many years later, did she assert a claim against petitioner.

CONCLUSION

This case presents serious due process issues concerning a statute invoked in thousands of cases annually in California. Petitioner respectfully requests this court grant Certiorari to review the issues.

Respectfully submitted,

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